Supreme Court, U. S.
FILED
FEB 15 1980
MICHAEL RODAK, JR., CLERK

79-6094

IN THE

SUPREME COURT OF THE UNITED STATES

1978 TERM

NO.

HECTOR CRUZ,

Appellant,

v.

NEW YORK.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND
THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

HECTOR CRUZ, appellant herein, respectfully applies for leave to proceed in forma pauperis in connection with the docketing of his appeal from a judgment of the New York Court of Appeals. Appellant's affidavit in support of the within application is annexed hereto.

Dated: February 18, 1980
New York, New York

Respectfully submitted,

WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
[212] 577-3420
Counsel for Appellant

STATE OF NEW JERSEY)
ss.:
COUNTY OF Middlesex)

HECTOR CRUZ, being duly sworn, deposes and says:

I am the petitioner herein and I make this affidavit in support of the within application to proceed in forma pauperis with respect to a judgment of the New York Court of Appeals rendered on November 20, 1979, which reversed an order of the Appellate Term, First Department, entered on July 6, 1979, which affirmed an order of the Criminal Court of the City of New York, Bronx County, rendered on October 31, 1978, dismissing an information which charged me with driving while under the influence of alcohol.

I am presently employed at Resistive Element Corp., 346 Bordentown Road, South Amboy, New Jersey, and earn $10,000 per year.

I am without funds to pay the cost of filing this petition, printing the record and briefs, or retaining counsel.

On appeal to the New York appellate courts, I was allowed to proceed as a poor person and was represented by assigned counsel associated with the Legal Aid Society of the City of New York. Such counsel have agreed to continue to represent me in this Court without expense to me.

I believe my case is meritorious, and this application is not made for purposes of delay.

Hector Cruz
HECTOR CRUZ

Sworn to before me this 9TH
day of February, 1980.

RAUL A. JIMENEZ
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires February 14, 1982

79-6094

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1979 TERM

No. 79-

HECTOR CRUZ,
Appellant,
-against-
NEW YORK

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

WILLIAM E. HELLERSTEIN
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IN THE

SUPREME COURT OF THE UNITED STATES

1979 TERM

No. 79-

HECTOR CRUZ,

Appellant,

-against-

NEW YORK

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

Appellant, Hector Cruz, appeals from a judgment of the New York Court of Appeals, entered November 20, 1979, which reversed an order of the Supreme Court of the State of New York, Appellate Term, First Department, which had affirmed an order of the Criminal Court of the City of New York, Bronx County, dismissing an information which charged appellant with a violation of Section 1192 of New York's Vehicle and Traffic Law. Appellant submits this Statement to show that the Court has jurisdiction of the appeal and that substantial questions are presented.

CITATION TO OPINIONS BELOW

The opinion of the New York Court of Appeals is officially reported at 48 N.Y.2d 419 and is annexed hereto as Appendix A. The majority and dissenting opinions of the Appellate Term are officially reported at 99 Misc.2d 634 and are annexed as Appendix B. The opinion of the Criminal Court is unreported and is annexed hereto as Appendix C.

JURISDICTION

In reversing the Appellate Term and reinstating the accusatory instrument against appellant the Court of Appeals upheld the constitutionality of Section 1192 of New York's Vehicle and Traffic Law. The judgment of the Court of Appeals was entered on November 20, 1979, and is annexed hereto as Appendix D. A notice of appeal was filed in

Criminal Court, Bronx County, the court possessed of the record, on January 28, 1980, and is annexed as Appendix E. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(2).

The complaint against appellant was dismissed by the trial court on the ground that Section 1192 of the Vehicle and Traffic Law, subdivisions (1) and (3), which prohibit a person from operating a motor vehicle while his ability to do so is "impaired by the consumption of alcohol," and "while in an intoxicated condition," are unconstitutionally vague (App. C). On the People's appeal to the Appellate Term the dismissal order was affirmed by a 2-1 vote, on the same ground (App. B). The New York Court of Appeals, however, reversed, sustained the constitutionality of the statutes and reinstated the accusatory instrument (App. A).

Although further state proceedings are contemplated, the judgment is final within the meaning of 28 U.S.C. §1257(2). The jurisdiction of the Court is sustained by the following decisions: Shaffer v. Heitner, 433 U.S. 186, 195-96 n.12 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 482-87 (1975); Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U.S. 386, 389 n.4 (1964); see Abney v. United States, 431 U.S. 651, 659 n.4 (1977).*

*The Court has repeatedly determined that it has jurisdiction where a state statute had been held constitutional by the highest state court, despite the fact that further state proceedings were pending which could possibly moot the constitutional issue. In Shaffer v. Heitner, 433 U.S. 186 (1977), as in the instant case, the Due Process Clause of the Fourteenth Amendment was implicated; at issue was whether the Delaware sequestration statute unconstitutionally permitted the state courts to exercise jurisdiction despite the absence of sufficient contacts between the defendants, the litigation, and the State of Delaware. Id. at 189. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the issue was whether the First and Fourteenth Amendments were violated by a Georgia statute which permitted a cause of action for damages for invasion of privacy caused by the publication of the name of a rape victim. Id. at 471. In Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964), the constitutional issue apparently was whether the Ohio Fair Trade Act violated the Commerce Clause of the United States Constitution, Art. 1, §8, cl. 3; this resolved to the issue of whether state fair trade laws were permitted by the McGuire Act, 15 U.S.C. §§45(a)(1)-(5). Id. at 386-88.

In each case, the federal issue was not subject to further review in the state courts, but would have been mooted had the defendant prevailed at trial on non-federal grounds. Nevertheless, the Court noted jurisdiction because if the state court had erroneously upheld the statute there should have been no trial at all. Shaffer, supra, 433 U.S. at 195-96 n.12; Cox, supra, 420 U.S. at 485. In Cox, supra, the Court articulated its pragmatic approach to finality, 420 U.S. at 476-87, and found that this approach justified its determination that the judgment

(fn. cont'd.)

QUESTIONS PRESENTED

Whether Section 1192 of the New York Vehicle and Traffic Law, which makes it an infraction to drive while the ability to operate a motor vehicle "is impaired by the consumption of alcohol" and a misdemeanor to drive "while in an intoxicated condition," but does not define the difference between the two, is unconstitutionally vague.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV.

STATUTORY PROVISIONS INVOLVED

New York Vehicle and Traffic Law, §§1192, 1194, 1195 (62A McKinney's Laws, Title 7, Article 31):

> §1192. Operating a motor vehicle while under the influence of alcohol or drugs
>
> 1. No person shall operate a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol.
>
> 2. No person shall operate a motor vehicle while he has .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.

(fn. cont'd.)
was final:

> Given these factors--that the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt--we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality.

Id., 420 U.S. at 486. Cox, Shaffer, and Hudson were civil cases, but the construction given to 28 U.S.C. §1257 in civil cases applies equally in criminal cases. See Abney v. United States, 431 U.S. 651, 659 n.4 (1977)(construction of §1291 applies equally to civil and criminal cases).

This pragmatic approach to finality justifies a finding of finality here as well. If a trial were held, appellant might prevail upon non-federal grounds, but if the statute is unconstitutional there should be no trial at all. Furthermore, because the statute would remain in effect, New York drivers would be forced to operate in the shadow of the criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt. Eroded would be the federal policy, implicit in the Due Process Clause, that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New York, 306 U.S. 451, 453 (1939).

> 3. No person shall operate a motor vehicle while he is in an intoxicated condition.
>
> 4. No person shall operate a motor vehicle while his ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.
>
> 5. A violation of subdivisions two, three or four of this section shall be a misdemeanor and shall be punishable by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment. A person who operates a vehicle in violation of subdivisions two or three of this section after having been convicted of a violation of subdivisions two or three of this section, or of driving while intoxicated, within the preceding ten years, shall be guilty of a felony. A person who operates a vehicle in violation of subdivision four of this section, after having been convicted of a violation of subdivision four of this section, or of driving while his ability is impaired by the use of drugs within the preceding ten years, shall be guilty of a felony.
>
> * * *
>
> §1194. Chemical tests
>
> 1. Any person who operates a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic or drug content of his blood....
>
> * * *
>
> 4. Evidence of a refusal to submit to such chemical test shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of section eleven hundred ninety-two of this chapter but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in his refusal.
>
> §1195. Chemical test evidence
>
> 1. Upon the trial of any action or proceeding arising out of actions alleged to have been committed by any person arrested for a violation of any subdivision of section eleven hundred ninety-two, the court shall admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to the provisions of section eleven hundred ninety-four of this chapter.
>
> 2. The following effect shall be given to evidence of blood-alcohol content, as determined by such tests, of a person arrested for a violation of section eleven hundred ninety-two:
>
> (a) Evidence that there was .05 of one per centum or less by weight of alcohol in such person's blood shall be prima facie evidence that the ability of such person to operate a motor vehicle was not impaired by the consumption of alcohol, and that such person was not in an intoxicated condition;
>
> (b) Evidence that there was more than .05 of one per centum but not more than .07 of one per centum by weight of alcohol in such person's blood shall be prima facie

evidence that such person was not in an intoxicated condition, but such evidence shall be relevant evidence, but shall not be given prima facie effect, in determining whether the ability of such person to operate a motor vehicle was impaired by the consumption of alcohol.

(c) Evidence that there was more than .07 of one per centum but less than .10 of one per centum by weight of alcohol in his blood shall be prima facie evidence that such person was not in an intoxicated condition, but such evidence shall be given prima facie effect in determining whether the ability of such person to operate a motor vehicle was impaired by the consumption of alcohol.

STATEMENT OF THE CASE

An information filed in the Criminal Court of New York City, Bronx County, charged appellant with resisting arrest and operating a motor vehicle "while under the influence of alcohol" on January 28, 1978. The latter charge referred to Section 1192 of the Vehicle and Traffic Law, which provides:

1. No person shall operate a motor vehicle while his ability to operate such a motor vehicle is impaired by the consumption of alcohol.

* * *

3. No person shall operate a motor vehicle while his is in an intoxicated condition.

Subdivision 1 (impaired) is a traffic infraction, punishable by a fine of up to $50, imprisonment of up to 15 days, or both, and a mandatory 60-day suspension of driving privileges. V.T.L. §§510(2)(b)(i), 1800(b). The first violation of subdivision 3 (intoxicated) is a misdemeanor, punishable by a fine of up to $500, imprisonment of up to one year, and a mandatory license revocation; the second violation is a felony. V.T.L. §§510(2)(a)(iii), 1192(5).

On February 15, 1978, after a probable cause hearing, the charge of resisting arrest was dismissed. At the hearing, the arresting officer testified that appellant refused to take a breathalyzer test.

Subsequent to the hearing, appellant moved to dismiss the information on the ground that Section 1192(1)(3) is unconstitutionally vague because it provides no definition of impaired, intoxicated, or the difference between the two. The court sustained the motion, holding that, especially when breathalyzer results are unavailable, the statute is unconstitutionally vague for failing to provide any useful guideline to determine the distinction between the two offenses (App. C, 8-9).

The order of dismissal was affirmed in a 2-1 decision of the Appellate Term. The majority held that the statute is vague both because it provides the citizen no notice of whether his conduct is criminal and because it provides the trial court no ascertainable standards to apply to the acts of a driver who is less than "very, very drunk" (App. B, 2-3). The dissent, however, maintained that no notice of the difference between "impaired" and "intoxicated" is required, and that the statute is not unconstitutional because it notifies the driver that if he drinks and drives he may violate it (App. B, 7-8).

The People appealed to the New York Court of Appeals which, unanimously, found the statute to be constitutional and ordered the accusatory instrument reinstated (App. A, 6).

Without defining "impaired," the Court of Appeals held that, for subdivision 1 of §1192,

> the question in each case is whether, by voluntarily consuming alcohol, this particular defendant has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

(App. A, 5).

The Court found that "intoxicated" is a term with a variety of meanings, but that did not deter it from reading one of the variety into the statute:

> In sum, intoxication is a greater degree of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

(App. A, 6).

These two formulations--which differ only as "impaired to any extent" differs from "incapable of employing"--the Court of Appeals held to be sufficiently distinct to satisfy due process.

THE QUESTION PRESENTED IS SUBSTANTIAL

The New York Court of Appeals has held V.T.L. §1192(1)(3) to be constitutional. That statute makes driving when one's ability to do so is "impaired by alcohol" a traffic infraction and when one is in an "intoxicated" condition a misdemeanor, but does not define the difference between "intoxicated" and "impaired by alcohol." This Court should

decide whether the use of the terms "impaired by alcohol" and "intoxicated" in juxtaposition to define distinct offenses without a definition of the distinction makes the statute unconstitutionally vague, in violation of the Fourteenth Amendment, Due Process principles articulated in this Court's opinions in Colautti v. Franklin, ___U.S.___, 58 L.Ed.2d 596 (1979), and Connally v. General Construction Co., 269 U.S. 385 (1926).*

In New York, the terms "intoxicated" and "impaired by alcohol" have long been held to have the same meaning. Prior to 1960, New York prohibited only driving while "in an intoxicated condition." 1910 N.Y. Laws c. 374, §290(3). The courts defined an "intoxicated" condition as one in which alcohol had affected one "to such an extent as to impair his judgment or his ability to operate an automobile (emphasis supplied)." People v. Weaver, 188 App. Div. 395, 400, 177 N.Y.S. 71 (3d Dept. 1919).** One's judgment or ability was not considered impaired, even in the slightest, until one was "incapable of giving that care and attention to the operation of his automobile that a man of prudence and reasonable intelligence would give (emphasis supplied)." Id. Under the pre-1960 statute, therefore, a driver knew he did not violate the law, despite consumption of alcohol, if he was not incapable of driving reasonably and prudently.

In 1960, a second offense was added to the statutory scheme, the traffic infraction of operating a vehicle while one's ability to do so was "impaired by alcohol." 1960 N.Y. Laws c. 184, §1. The law, however,

*Other than New York, six states have experimented with two-level drunken driving statutes. Of these, only three remain in effect. Colo. Rev. Stat. §42-4-1202(1)(a)(b); Md. Transp. Code Ann. §21-902(a)(b); Mich. Comp. Laws §257.625(a)(b). The other three states have eliminated one of the two offenses. 1971 Me. Laws c. 547; 1977 N.J. Laws c. 29, §1; 1972 Va. Acts c. 757. The New York legislature in 1971 defeated a measure recommended by the Transportation Committee that would have eliminated "impaired." 1971 N.Y. Legis. Annual 466. Two-step drunken-driving statutes have been upheld against vagueness challenges in Bass v. Commonwealth, 209 Va. 422, 164 S.E.2d 667 (1968); State v. Bryce, 243 A.2d 726 (Me. 1968); People v. Lambert, 395 Mich. 296, 235 N.W.2d 338 (1975); Thompson v. People, 181 Colo. 194, 510 P.2d 311 (1973); and Brooks v. State, 41 Md. App. 123, 395 A.2d 1224 (Ct. Spec. App. 1979).

**Drunken driving is only one area in which "intoxicated" and "impaired by alcohol" are synonymous. See, e.g., People v. Bevilacqua, 12 Misc.2d 558, 568, 170 N.Y.S.2d 423, (Essex Co. Ct. 1958)(public intoxication charge requires proof of impairment of physical and mental faculties). Significantly, when the legislature wanted to provide a parallel misdemeanor to driving while intoxicated, it chose the term "impaired by the use of a drug." 1966 N.Y. Laws c. 963; §1; V.T.L. §1192(4). The standard of proof for the two offenses has been held to be the same. People v. Van Tuyl, 79 Misc.2d 262, 268, 359 N.Y.S.2d 958 (App. Term, 2d and 11th Jud. Dists. 1974).

did not define the two offenses or the difference between them, except to provide different penalties.*

The juxtaposition of the two offenses makes the statute unconstitutionally vague. It is not apparent whether, by adding "impaired," the legislature intended to outlaw acts which previously were legal or, instead intended to maintain the same initial threshold of illegality. A driver no longer knows whether evidence that he is affected by alcohol but capable of normal driving will establish his innocence of either or both charges. Because men of ordinary intelligence must guess as to the meaning of the statute and differ as to its application, it is unconstitutionally vague. See Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

The two-level law has tormented the courts of New York, especially when chemical test results are unavailable. The elements of the two offenses have been held to be identical. People v. Grejszak, 100 Misc.2d 1045, 1046, 420 N.Y.S.2d 483 (Sup. Ct., Erie Co. 1979). Some courts, finding no way of distinguishing the two offenses, have refused to charge the lesser. See, e.g., People v. Graser, 90 Misc.2d 219, 224-25, 393 N.Y.S.2d 1009 (Town Ct. of Amherst, Erie Co. 1977). Others have refused to uphold a conviction of the greater offense, absent proof that the defendant was very, very drunk. See, e.g., People v. Kapsuris, 89 Misc.2d 634, 635, 392 N.Y.S.2d 785 (Erie Co. Ct. 1976). Thus, the two-level law has been applied in the arbitrary and erratic manner which

*In the instant case, where no chemical test results are available, V.T.L. §1195 is of no relevance. That section provides, in substance that:

> (a) Evidence of .05 of 1% or less of alcohol in the blood is prima facie evidence of neither impairment nor intoxication.
> (b) Evidence of more than .05 of 1% but not more than .07 of 1% of alcohol content is relevant evidence in determining impairment and is prima facie evidence that the driver was not intoxicated.
> (c) Evidence of more than .07 of 1% but less than .10 of 1% by weight of alcohol in the blood is prima facie evidence of impairment and is prima facie evidence that the driver was not intoxicated.

Even when test results are available, that section does not adequately define the two offenses. The court confronted with "prima facie" evidence has no way of discerning the nature or degree of evidence necessary to rebut the presumption. Likewise, the court confronted with "relevant" evidence does not know what additional evidence is necessary to prove the driver's guilt.

due process abhors. See Colautti v. Franklin, ___U.S.___, 58 L.Ed.2d 596, 606 (1979); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

To quote the remarks of the Criminal Court opinion approved by the Appellate Term majority (App. B, 1):

> V.T.L. §1192 subdivision 1 and 3, fail to meet due process requirements of the Fourteenth Amendment of the U.S. Constitution and Article one, Section six of the New York Constitution. V.T.L. §1195 falls far short of providing any useful guideline to determine the distinction between impairment and intoxication. When a chemical test is not done, or not done properly, or just refused by the defendant, we are left with the ancient Weaver definition. This proves to be no help as the term impairment is used to define the term intoxication. One undefined term is used to define another undefined term, and the difference in degree between the two terms is left unclear. The average citizen is unable to determine when his next drink will push him over the precipice from a violation of impairment to a violation for a crime of intoxication. These sections are vague because men of common intelligence must necessarily guess at their meanings and differ as to their applications. A person is not able, from the face of the statute, to know in advance whether his actions are criminal or not. The statute thus violates the first essential of due process of law.

(App. C, 9).

The opinion of the Court of Appeals does not elucidate the distinction between the two offenses. That court stated that one is guilty of the traffic infraction if one has "impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver" (App. A, 5). The court has also stated that one is guilty of the misdemeanor if one is "incapable of employing" the same abilities (App. A, 6). Yet there remains no apparent distinction between the two standards. If one is capable of doing something, how is one's ability to do it impaired? All that one can glean from the opinion is that "intoxication" is a more severe degree of "impairment." One cannot determine what degree of infirmity constitutes an impairment or when a driver passes from that condition into intoxication.*

*The Court of Appeals has conceded that it has not delineated the difference between the two offenses by referring to People v. Eboli, 34 N.Y.2d 281, 357 N.Y.S.2d 435 (1974), a case in which it held that the criteria which distinguish felony coercion from misdemeanor coercion need not be specified, so long as adequate guidelines are provided to the prosecutor. Id., 34 N.Y.2d at 287-88; See People v. Discala, 45 N.Y.2d 38, 42-43, 407 N.Y.S.2d 660 (1978). That decision is at odds with State v. Pirkey, 203 Ore. 697, 705, 281 P.2d 698 (1955), in which the Oregon Supreme Court held unconstitutional a statute which did not define the criteria that distinguished felony and misdemeanor charges of writing a check upon insufficient funds.

This Court found an analogous statute to be unconstitutionally vague in Colautti v. Franklin, ___U.S.___, 58 L.Ed.2d 596 (1979). That case concerned the Pennsylvania Abortion Control Act, 35 Pa. Stat. Ann. §6605(a)(Purdon), which required a higher standard of care in performing abortions if the fetus "is viable or if there is sufficient reason to believe that the fetus may be viable." The term "viable," standing alone, was adequately defined as "the capability of a fetus to live outside the mother's womb albeit with artificial aid." 35 Pa. Stat. Ann. §6602 (Purdon); See Roe v. Wade, 410 U.S. 113, 160 (1973). Its juxtaposition with "may be viable," however, made both terms unclear:

> Since we must reject appellants' theory that "may be viable" means "viable," a second serious ambiguity appears in the statute. On the one hand, as appellees urge and as the District Court found, see 401 F.Supp., at 572, it may be that "may be viable" carves out a new time period during pregnancy when there is a remote possibility of fetal survival outside the womb, but the fetus has not yet attained the reasonable likelihood of survival that physicians associate with viability. On the other hand, although appellants do not argue this, it may be that "may be viable" refers to viability as physicians understand it, and "viable" refers to some undetermined stage later in pregnancy. We need not resolve this question. The crucial point is that "viable" and "may be viable" apparently refer to distinct conditions, and that one of these conditions differs in some indeterminate way from the definition of viability as set forth in Roe and in Planned Parenthood."

Colautti, supra, 58 L.Ed.2d at 607-08.

For the same reason, the statute at issue here is unconstitutional. Here, it is obvious that "intoxicated" and "impaired by alcohol" are to have different meanings, but it is unclear whether "impaired" refers to a condition in which driving was formerly permissible or whether "intoxicated" refers to a more severely afflicted condition than it formerly did. The two terms apparently refer to distinct conditions, one of which differs in some indeterminate way from the definition of "intoxicated" that previously prevailed in New York. Because V.T.L. §1192 conditions potential criminal liability on confusing and ambiguous criteria, it is unconstitutionally vague. See Colautti, supra, 58 L.Ed.2d at 608.

The decision of this Court in United States v. Batchelder, ___U.S.___, 60 L.Ed.2d 755 (1979) supports our position. That case concerned "two independent gun control statutes, each fully enforceable

on its own terms . . . . " 60 L.Ed.2d at 762. Each "unambiguously [specified] the activity proscribed and the penalties available on conviction." 60 L.Ed.2d at 764. This Court held that, in such a case, [s]o long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied." 60 L.Ed.2d at 764. Here, in contrast, the subdivisions are not independent, and the prohibited conduct is not clearly defined, so the statute is unconstitutional.

The Court of Appeals reached its erroneous conclusion through a misreading of this Court's decisions in United States v. Harriss, 347 U.S. 612 (1954); United States v. Petrillo, 332 U.S. 1 (1947); United States v. Wurzbach, 280 U.S. 396 (1930); and Nash v. United States, 229 U.S. 373 (1913). Wurzbach concerned a statute that prohibited government employees from soliciting or receiving funds from other government employees for "any political purpose whatsoever." Since Wurzbach held only that a Congressman's solicitation of funds for a primary campaign clearly fell within the statute's intended ambit, it has no relevance here.

Like the statute at issue here, the ones involved in Harriss, Petrillo, and Nash dealt with questions of degree, but unlike the statute here those statutes adequately defined the line between prohibited and permitted conduct; all that was unclear was whether the jury in a specific case would find that the given facts constituted a violation. In Nash, the line was drawn at an undue restraint of trade; in Petrillo, at compelling the hiring of unnecessary employees; in Harriss, at the solicitation of funds to be used principally to influence the passage or defeat of legislation. The meanings of "undue," "unnecessary," and "principally" are clear, even though a given case might pose a factual question to the jury. Here, in contrast, the meanings of "intoxicated" and "impaired by alcohol," because of their juxtaposition, are unclear.

Directly on point is this Court's decision in Connally v. General Construction Co., 269 U.S. 385 (1926). In that case, a statute which required employers to pay their employees the current rate of wages in the locality was held unconstitutional for failing to specify whether

the lowest, highest or average wage was required. Id. at 393-94. Because the dividing line between lawful and unlawful activity was left to conjecture, the statute was held unconstitutional.

It bears emphasis that, in Connally, an employer could have avoided trouble by paying his employees more than anyone else, and could have guaranteed trouble by paying them less than anyone else. Similarly, in Colautti, supra, a physician could have avoided trouble by performing abortions only in early pregnancy. The statutes were nevertheless held to be vague. Here, although the statute is clear enough in the case of the driver who has had no alcohol and in the case where the driver concedes that he is very, very drunk [see United States v. Channel, 423 F. Supp. 1017, 1019, 1026 (D. Md. 1976)] it is ambiguous in the vast majority of cases that fall in between.

We do not dispute that the Constitution does not require impossible standards, Petrillo, supra, 332 U.S. at 7, nor that the doubtfulness of a marginal case does not invalidate a statute, Harriss, supra, 347 U.S. at 618; Petrillo, supra, 332 U.S. at 7; Wurzbach, supra, 280 U.S. at 399; nor that a statute containing a clearly defined element of degree as to which estimates may differ is not invalid, Nash, supra, 229 U.S. at 377. Here, however, unlike the cited cases, one must guess as to where the line is drawn to begin with, and then guess again as to whether a driver has crossed it. Although a statute that requires only the latter guess may not be unconstitutional, a statute is which requires one to guess as to the meaning of its terms. Because V.T.L. §1192 is so indefinite that men of common intelligence must guess as to its meaning and differ as to its application, it is unconstitutionally vague. Connally v. General Construction Co., supra, 269 U.S. at 391.

CONCLUSION

The question presented by this appeal is a substantial one the resolution of which requires plenary consideration by this Court.

Respectfully submitted,

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February, 1980

APPENDIX A

OPINION OF
THE NEW YORK COURT OF APPEALS

OPINION OF THE COURT

WACHTLER, J.

The question on this appeal is whether subdivision 1 of section 1192 of the Vehicle and Traffic Law, which prohibits driving while the ability to operate a motor vehicle "is impaired by the consumption of alcohol", and subdivision 3, which prohibits driving "while * * * in an intoxicated condition", are unconstitutionally vague in a case where the driver has refused to submit to any scientific test for determining the amount of alcohol he has consumed. The trial court held that, in the absence of a scientific test, the statutory concepts of impairment and intoxication were so vague and indefinite as to violate the defendant's right to due process. The Appellate Term affirmed with one dissent. The People have appealed.

On the evening of January 28, 1978 a police officer observed the defendant driving in an erratic manner on Third Avenue in Bronx County. The officer stopped the defendant after he had driven through a steady red light. As the defendant left his car the officer detected a strong odor of alcohol on his breath. When he asked the defendant to produce his license and registration the defendant threw them at him. The officer then asked the defendant if he had been drinking and the defendant said that he had a couple of drinks. At this point the officer informed the defendant that he was placing him under arrest for "intoxicated driving". He subsequently asked the defendant if he would take a breathalyzer test but the defendant refused.

The defendant was charged with a misdemeanor for operating a motor vehicle while under the influence of alcohol in violation of section 1192 of the Vehicle and Traffic Law, based solely on the officer's observations at the time of arrest. In the accusatory instrument the officer noted that he had first observed the defendant driving in an erratic manner and that the "defendant's eyes were watery and bloodshot, his speech was slurred and the defendant was unsteady on his feet, and his breath bore the odor of alcohol." At a preliminary hearing the officer also testified that he had shined his flashlight into the defendant's eyes and observed that "the pupils did not dilate". It also appears that the defendant was given a coordination test at the police station by another officer who was not called at the hearing.

The defendant made a pretrial motion to dismiss on the grounds that (a) the accusatory instrument was insufficient in that it failed to inform him whether he was being charged with driving while intoxicated or driving while impaired and (b) that subdivisions 1 and 3 of section 1192 of the Vehicle and Traffic Law were unconstitutionally vague.

As noted, the courts below agreed with the defendant's second contention. They held that the statutory terms, impaired and intoxicated, were too vague and indefinite to satisfy due process requirements when applied to cases where no chemical test results were available. Thus the accusatory instrument was dismissed prior to trial.

[1] It is a fundamental requirement of due process that a criminal statute must be stated in terms which are reasonably

definite so that a person of ordinary intelligence will know what the law prohibits or commands *(Connally v General Constr. Co.,* 269 US 385, 391; *United States v Petrillo,* 332 US 1, 6; *People v Smith,* 44 NY2d 613; see, generally, Note, The Void-for-Vagueness Doctrine, 109 U of Penn L Rev 67). The concept promotes fairness to the defendant in two respects. First it insures that the defendant will receive adequate warning of what the law requires so that he may act lawfully. "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed" *(United States v Harriss,* 347 US 612, 617). Secondly, it serves to prevent arbitrary and discriminatory enforcement by requiring "boundaries sufficiently distinct" for police, Judges and juries to fairly administer the law *(United States v Petrillo, supra,* p 7; *Papachristou v City of Jacksonville,* 405 US 156; *Grayned v City of Rockford,* 408 US 104, 108-109).

But the Constitution only requires reasonable precision; it does not impose "impossible standards" *(United States v Petrillo, supra,* pp 7-8). Thus "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubt might rise" *(United States v Harriss, supra,* p 618; *United States v Petrillo, supra,* p 7; *United States v Wurzbach,* 280 US 396, 399).

In this State the first statute to prohibit driving while "in an intoxicated condition" was adopted in 1910 (L 1910, ch 374, § 290, subd 3; see, also, King and Tipperman, The Offense of Driving While Intoxicated: the Development of Statutory and Case Law in New York, 3 Hofstra L Rev 541, 544). Convictions under that statute could be based solely on the defendant's conduct and demeanor at the time of arrest. It was not until 1941 that the results of scientific tests for alcohol content were made admissible by statute (L 1941, ch 726, § 1). In 1960 a new offense, driving "while ability is impaired by the consumption of alcohol", was adopted as a lesser offense than intoxication (L 1960, ch 184, § 1).

Originally, impairment could only be established by scientific proof showing a specific blood alcohol content (see, e.g., *People v Bronzino,* 25 AD2d 685). This requirement was eliminated, however, in 1970 (L 1970, ch 275; see, also, Governor's Memorandum, NY Legis Ann, 1970, p 364). Now, whether the defendant is charged with driving while intoxi-

cated or driving while impaired by alcohol, scientific evidence of blood alcohol content, although admissible (Vehicle and Traffic Law, § 1195, subd 1), is not essential. Since the defendant's consent is required for any blood alcohol analysis (Vehicle and Traffic Law, § 1194, subd 2), the present statutory scheme serves to prevent the defendant from defeating a criminal prosecution for either offense by simply refusing to take the test.

The relevant portion of the current statute (Vehicle and Traffic Law, § 1192), applicable also at the time of the arrest in this case, reads as follows:

"1 No person shall operate a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol

• • •

"3 No person shall operate a motor vehicle while he is in an intoxicated condition."

Driving while the ability to operate a motor vehicle is impaired by the consumption of alcohol is a traffic infraction (Vehicle and Traffic Law, § 155). Driving while intoxicated is a misdemeanor or, in the case of a second conviction within 10 years, a felony (Vehicle and Traffic Law, § 1192, subd 5). Evidence that a defendant had less than .10 of 1% of alcohol in his blood is prima facie evidence that he was not intoxicated (Vehicle and Traffic Law, § 1195, subd 2, pars [a], [b], [c]); if there is a higher percentage of alcohol, a defendant would be guilty of a misdemeanor (Vehicle and Traffic Law, § 1192, subds 2, 5).

Concerning impairment, the statute provides that a reading of more than .07 but less than .10 of 1% of alcohol in the blood is prima facie evidence that a defendant's ability to operate a vehicle was impaired (Vehicle and Traffic Law, § 1195, subd 2, par [c]). A reading of .05 or less is prima facie evidence that a defendant was not impaired or, of course, intoxicated (Vehicle and Traffic Law, § 1195, subd 2, par [a]).

The lower courts felt that this case disclosed a gap in the legislative scheme. They held that the Legislature had neglected to define impairment or intoxication, except in relationship to the alcoholic content of the blood. Thus they concluded that in cases where no test results are available there are no definite standards to guide the defendant, the police, or the courts in determining whether driving after

consuming some alcohol would violate the statute and, if so, to what degree.

With respect to impairment the defendant urges that it is not clear whether the statute prohibits driving when the driver is extremely impaired, only moderately impaired, or even impaired to a slight degree and whether an objective or a subjective standard applies. On its face, however, the statute does not speak of degrees of impairment; it simply prohibits the driving of a motor vehicle when the driver's "ability to operate such vehicle is impaired" (Vehicle and Traffic Law, § 1192, subd 1). Thus driving a motor vehicle while there is any alcoholic impairment of the driver's "ability to operate such vehicle" would constitute a violation.

That is not to say, of course, that every person who drinks before driving violates the law. On the contrary the Legislature recognized that the average person can consume a certain amount of alcohol without impairing his ability to operate a motor vehicle as he should. Otherwise the Legislature would not have provided that proof of .05 of 1% or less of blood alcohol content is prima facie evidence that the driver was not impaired or intoxicated (Vehicle and Traffic Law, § 1195, subd 2, par [a]). Of course some persons may find their driving faculties impaired by the least consumption of alcohol and, therefore, would be guilty of driving while impaired while others would not (Vehicle and Traffic Law, § 1195, subd 2, par [a]). And the Legislature also recognized that some individuals may be able to consume greater amounts of alcohol without being impaired, as would the average driver (Vehicle and Traffic Law, § 1195, subd 1, par [c]). Thus the impairment statute, by simply providing prima facie standards, takes into account the "subjective" tolerance of individuals in determining the ability to drive possessed by a defendant at the time of arrest. But in determining whether that ability is less than he *should* possess, the statute necessarily contemplates the use of the objective standard expected of the average driver. Obviously one cannot defend on the ground that, even when he has consumed no alcohol, he generally drives with less prudence and care than is expected of the average driver.

[2] In sum the prohibition against driving while the ability to do so is impaired by alcohol (Vehicle and Traffic Law, § 1192, subd 1) is not a vague and indefinite concept as the defendant contends. It is evident from the statutory language

and scheme that the question in each case is whether, by voluntarily consuming alcohol, this particular defendant has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

Driving while intoxicated is a more serious offense (Vehicle and Traffic Law, § 1192, subd 5) and thus involves a greater degree of impairment. The courts below held, however, that the line between the two is vague and indefinite because the Legislature failed to provide any verbal definition or standard of comparison. This, it is said, leaves a defendant without any warning as to when he might cross the threshold from mere impairment to intoxication and thus run the risk of a conviction for a more serious offense. In addition, he claims that the absence of guidelines gives law enforcement officers and the courts an impermissible discretion to prosecute and convict for the higher offense.*

Although the Legislature did not include a definition of intoxication in the statute, it does not follow that the term is without a definite or ascertainable meaning. Intoxication is not an unfamiliar concept. It is intelligible to the average person (Richardson, Evidence, § 364, pp 332-333). It is familiar to the law and has long been held to mean an incapacity to perform various mental or physical acts which an average person would be able to do. Of course intoxication is a variable term in the sense that a person, despite the consumption of alcohol, may be able to do certain things (for instance, physically operate a motor vehicle), while his ability to do something more demanding (such as operate a motor vehicle safely) may be destroyed. But the standard for determining intoxication is constant; that is, whether the individual's consumption of alcohol has rendered him *incapable* of employing the physical or mental abilities needed to, for instance, form a specific intent *(People v Koerber,* 244 NY 147, 152; see, also, Perkins, Criminal Law, pp 793-794), understand the nature and effect

* We note that even if the offenses did overlap it is doubtful that the resulting prosecutorial discretion would offend due process *(People v Eboli,* 34 NY2d 281). And although constitutional notions of fairness require the notice to the defendant of what is prohibited so that he may act lawfully, the standard is less demanding where questions of degree are involved (see, e.g., *Nash v United States,* 229 US 373, 377; *United States v Wurzbach,* 280 US 396, 399, *supra*). And it may be that fairness would permit even less precise notice when the defendant is not called upon to choose between a lawful act and an unlawful one, but between two unlawful acts of different degrees.

of a contract (Simpson, Contracts, § 79, p 293) or testify truthfully and accurately *(Hartford v Palmer,* 16 Johns 143).

[2, 3] A statute which employs terms having an accepted meaning "long recognized in law and life" cannot be said to be so vague and indefinite as to afford the defendant insufficient notice of what is prohibited or inadequate guidelines for adjudication *(International Harvester Co. v Kentucky,* 234 US 216; *Nash v United States,* 229 US 373, 377; *People v Grogan,* 260 NY 138; *People v Mancuso,* 255 NY 463, 470), even though there may be "an element of degree in the definition as to which estimates might differ" *(Connally v General Constr. Co.,* 269 US 385, 391, *supra).* And words and phrases used in a statute should be given their ordinary meaning when, as here, the Legislature has given no indication that a different meaning was intended (see, e.g., McKinney's Cons Laws of NY, Statutes, Book 1, § 232). This is particularly apt when it is claimed that the statute might otherwise lack sufficiently definite standards or guidelines to satisfy the requirements of due process (see, e.g., *Screws v United States,* 325 US 91).

[2] In sum, intoxication is a greater degree of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

As noted, the concept of intoxication does not require expert opinion. A layman, including the defendant and those charged with administering the law, should be able to determine whether the defendant's consumption of alcohol has rendered him incapable of operating a motor vehicle as he should. Thus, even when no chemical test has been made of the driver's blood alcohol content, the statute provides reasonable warning of what is prohibited and sufficient standards for adjudication.

We therefore conclude that subdivisions 1 and 3 of section 1192 of the Vehicle and Traffic Law are not unconstitutionally vague or indefinite when applied to a case where an analysis of the driver's blood alcohol content is unavailable.

Accordingly, the order of the Appellate Term should be reversed, the accusatory instrument reinstated and the case remitted to the Criminal Court for further proceedings.

Chief Judge COOKE and Judges JASEN, GABRIELLI, JONES, FUCHSBERG and MEYER concur.

APPENDIX B

MAJORITY AND DISSENTING OPINIONS
OF THE APPELLATE DIVISION, FIRST DEPARTMENT

OPINION OF THE COURT

Per Curiam.

Order of the Criminal Court of the City of New York, Bronx County (FIGUEROA, J.), dated October 31, 1978, is affirmed.

Section 1192 of the Vehicle and Traffic Law which prohibits driving in either an "impaired" or an "intoxicated" condition is unconstitutionally vague in violation of the right to due process (US Const, 14th Amdt; NY Const, art I, § 6).

The due process clause requires that a criminal statute be sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute *(Colautti v Franklin,* — US —, 47 USLW 4094, 4097). Also, the statute must provide explicit standards for the policemen, Judges and juries who apply it so that resolution of individual cases is not on an *ad hoc* and subjective basis *(People v Smith,* 44 NY2d 613, 618-619; *Grayned v City of Rockford,* 408 US 104, 108-109). The statute in question does not define either "impaired" or "intoxicated." This is especially critical in applying the subject statute since driving whle impaired (Vehicle and Traffic Law, § 1192, subd 1) is a violation and driving while intoxicated (Vehicle and Traffic Law, § 1192, subd 3) is a crime.

The court below aptly noted that "[t]hese sections are vague because men of common intelligence must necessarily guess at their meanings and differ as to their applications. A person is not able, from the face of the statute, to know in advance whether his actions are criminal or not." To this we add the observation that not only the citizenry are left to guess and differ but the courts of the State have also rendered conflicting and varying definitions as to the term "intoxication" as used in the statute. One court has found a driver must be

"very, very drunk" in order to be convicted of a misdemeanor under subdivision 3 *(People v Barrett,* 89 Misc 2d 631, 634 [Town Ct of Tonawanda, Erie County]; see, also, *People v Kapsuris,* 89 Misc 2d 634, 635 [Erie County Ct]). In *People v Graser* (90 Misc 2d 219, 224) the Town Court of Amherst, Erie County, observed with commendable candor: "Can we say that to be impaired means that the defendant is less drunk than if he were intoxicated, and, that to be intoxicated means that he is more drunk than if he were impaired?—We have so charged juries innumerable times, *but have never felt satisfied nor comfortable with that statement."* (Emphasis added.) Other courts have held that proof of a substantial degree of impairment is required, compared to the driver's own normal judgment and ability *(People v Miller,* 83 Misc 2d 118, 119 [Town Ct of Webster, Monroe County]; *People v Little,* NYLJ, May 10, 1978, p 15, col 6 [Sup Ct, Westchester County]). A court in The Bronx held that "[t]he difference between intoxication and impairment is a matter of degree." If the loss of physical control of the vehicle, reasoned the court, is less than that which would be experienced by a reasonably prudent driver, the defendant would be guilty of driving while "impaired." If the loss of control were of a higher degree, the jury could determine that the defendant was guilty of "intoxication." *(People v Bradford,* 96 Misc 2d 298, 300 [Sup Ct, Bronx County].)

It is a well-established principle that "vagueness" challenges to statutes, which do not involve First Amendment freedoms, must be examined in the light of the facts of the case at hand *(United States v National Dairy Corp.,* 372 US 29; *United States v Mazurie,* 419 US 544).

The information in the instant case charged defendant with violating an unspecified subdivision of section 1192 of the Vehicle and Traffic Law. It does not establish that under the circumstances of defendant's arrest, he was either obviously drunk, or his ability to drive was merely impaired. Thus, a defendant who was very, very drunk, or so charged would clearly violate the statute and the language therein could not be held to be constitutionally vague. Thus, in *People v Farmer* (36 NY2d 386, 391) a driver charged with a misdemeanor who had .21 of 1% by weight of alcohol in his blood was convicted under subdivision 2, which requires only .10 of 1%. Judge FUCHSBERG, in a concurring opinion, referring to the legislative intent in enacting sections 1192 and 1196 of the Vehicle

and Traffic Law to reduce highway injuries and deaths pointed out (p 392) that "[w]hile such legislative intent is laudable, it may not impair the due process requirement for providing a defendant with notice of an offense charged. *(In re Oliver,* 333 US 257.)"

In a case such as *Farmer* and *United States v Channel* (423 F Supp 1017) where the defendant was also "highly intoxicated," there has been no difficulty in determining that there has been no denial of due process.

These cases are inapposite to the case at bar, however. In the case before this court, the defendant's driving ability may have been only slightly diminished, and no chemical test results were available. Under these facts, the statute provides no ascertainable standards for a trial court to apply to defendant's acts and thus is constitutionally vague. Accordingly, the order appealed from should be affirmed.

HUGHES, J. P. (dissenting). I respectfully dissent and would vote to reverse the order appealed from and to reinstate the information.

Defendant was arrested on January 28, 1978 and charged with resisting arrest (Penal Law, § 205.30) and operating a motor vehicle while under the influence of alcohol (Vehicle and Traffic Law, § 1192). At the preliminary hearing on February 15, 1978, Police Officer Daniel Marrone testified that he observed defendant go through a red light, and after stopping him, smelled alcohol on his breath. Defendant refused to submit to a breathalyzer test and/or a chemical test. At the conclusion of the hearing, the charge of resisting arrest was dropped. Thereafter, defendant moved to dismiss the remaining charge under section 1192 of the Vehicle and Traffic Law on the ground that the statute is unconstitutionally vague on its face and violates due process under the Fourteenth Amendment of the United States Constitution and section 6 of article I of the New York State Constitution.

Although defendant's attorney's affirmation in support of that motion alleges that the accusatory part of the information fails to adequately designate the offense charged, in an amended answering affirmation, the People disclose that subpoenaed police department records show that defendant stated the charge against him to be subdivision 3 of section 1192 of the Vehicle and Traffic Law. This specific charge is also contained in a judicial subpoena issued by the criminal court.

Defendant's argument in his motion papers was that the charge of violation of section 1192 of the Vehicle and Traffic Law in the accusatory instrument, based on the arresting police officer's deposition, failed to inform him sufficiently to defend the charge. This argument was based in part upon the alleged failure to indicate the subdivision of the statute under which defendant was being charged.

The arresting officer's affidavit alleges "that at the aforementioned date, time and location the defendant did operate a motor vehicle while under the influence of alcohol in that defendant was observed by the deponent driving his vehicle in an irratic *[sic]* and reckless manner. Deponent further states, that the defendant's eyes were watery and bloodshot, his speech was slurred and the defendant was unsteady on his feet, and his breath bore the odor of alcohol."

In its decision dated October 31, 1978 granting the motion dismissing the information, the court (FIGUEROA, J.) found that subdivisions 1 and 3 of section 1192 of the Vehicle and Traffic Law fail to meet due process requirements of the Fourteenth Amendment of the United States Constitution and section 6 of article I of the New York Constitution, by failing to provide any useful guideline to distinguish between impairment (subd 1) and intoxication (subd 3), so that "[t]he average citizen is unable to determine when his next drink will push him over the precipice from a violation for impairment to a violation for a crime of intoxication." The ambiguity or vagueness of the statute makes it necessary, in the opinion of the court below, for men of common intelligence to guess at their meanings. "A person is not able, from the face of the statute, to know in advance whether his actions are criminal or not. The statute thus violates the first essential of due process of law."

A conviction for impairment under subdivision 1 of section 1192 is an infraction whereas a subdivision 3 of section 1192 conviction is a misdemeanor carrying a penalty of a maximum term of one year, a fine up to $500, or both. A conviction of either subdivision 2 or 3 within 10 years of a previous violation of either of these subdivisions constitutes a felony.

The court below applied the guideline enunciated by the United States Supreme Court in *Connally v General Constr. Co.* (269 US 385, 391) "[t]hat the terms of a penal statute * * * must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them

liable to its penalties * * * and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." It found that section 1192 of the Vehicle and Traffic Law does not clearly indicate what it is one has the duty to avoid and is neither informative on its face nor so clear and positive as to give unequivocal warning to citizens of the rule to be obeyed, citing *People v Firth* (3 NY2d 472); *People v Vetri* (309 NY 401); *People v Caswell-Massey Co.* (6 NY2d 497); *People v Diaz* (4 NY2d 469). The court found the most important criterion of statutory constitutionality to be whether a person is able to know in advance whether his actions are criminal or not *(Tozer v United States,* 52 F 917; and *People v Bevilacqua,* 12 Misc 2d 558).

The pertinent sections of the statute defendant claims to be unconstitutionally vague are as follows:

"1. No person shall operate a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol."

"3. No person shall operate a motor vehicle while he is in an intoxicated condition."

Section 1192 of the Vehicle and Traffic Law as originally enacted contained only a prohibition against driving while intoxicated. In 1960, a new subdivision prohibiting driving while one's ability was impaired by alcohol was added. It provided, however, that no conviction could be had on a not guilty plea unless the defendant had submitted to a chemical test and the results showed .10 of 1% or more of alcohol in his blood. Impairment, under the 1960 statute, was ascertainable under the measurement standard included in subdivision 1. With the re-enactment of the statute in 1970, reference to the requirement of a chemical test for proof of impairment under subdivision 1 was eliminated. Under subdivision 2 of the new section 1192 of the Vehicle and Traffic Law, a person is prohibited from operating a motor vehicle while he has a .10 of 1% or more of alcohol in his blood as determined by a chemical test.

The statutory change of standards of proof for subdivision 1 made it possible to prove impairment under subdivision 1 by observational testimony alone. This change, however, the court below said, fails to give defendant adequate notice, beforehand, of the line of demarcation between impairment

and intoxication and without a definitive test, the meanings of the terms, impairment and intoxication, make it possible for one person to be convicted of an infraction for impairment, and another of a misdemeanor for intoxication, for the same act. Nor did the court find the enactment of section 1195 of the Vehicle and Traffic Law together with the new section 1192, setting forth standards of alcohol-blood levels as prima facie evidence of impairment or intoxication, an adequate substitute for the provisions under the former statute. The court notes that section 1195 has no application where for any one of several reasons a chemical test has not been made.

In *People v Farmer* (36 NY2d 386) the constitutionality of section 1196 of the Vehicle and Traffic Law was upheld in a decision which is interpreted as establishing impairment under subdivision 1 of section 1192 as a lesser included offense of intoxication under subdivision 3.

In its decision, the Court of Appeals found that subdivisions 1, 2 and 3 proscribe separable offenses based on the degree of impairment, but they closely overlap and are species of the generic offense of "Operating a motor vehicle while under the influence of alcohol", so that a simplified traffic information charging a violation of subdivision 3 of section 1192 gives ample notice to a defendant, that pursuant to section 1196, he faces the posibility of a conviction under subdivisions 1 or 2 of section 1192.

"The distinctions involved are no greater, and, indeed, are less than those involved in the charging and conviction for lesser or included offenses in the criminal law" (pp 390-391).

The challenge to subdivisions 1 and 3 of section 1192 in the case at bar is the failure to define "impaired" and "intoxicated" so as to establish defendant's guilt or innocence in the absence of chemical text evidence.

"A strong presumption of validity attaches to a statute, and the burden of proving invalidity is upon those who challenge the statute to prove such invalidity beyond a reasonable doubt *(People v Scott,* 26 NY2d 286; *Matter of Van Berkel v Power,* 16 NY2d 37). A criminal statute need only describe the proscribed conduct with a reasonable degree of certainty, such that the statute convey to one of ordinary experience and understanding of the acts prohibited *(Boyce Motor Lines v United States,* 342 US 337)." *(People v Reid,* 95 Misc 2d 822, 823-824.)

In cases where the evidence disclosed beyond a reasonable

doubt that the defendant was "highly intoxicated" *(United States v Channel,* 423 F Supp 1017, 1018) the courts had little difficulty in determining that there was no denial of due process, even where it found that "the standard 'intoxicated' in the Maryland statute pertaining to driving while intoxicated, is seemingly capable of more precise definition."

"It is well established that vagueness challenges to to statutes which do not involve First Amendment freedoms must be examined in the light of facts of the case at hand. *United States v National Dairy Products Corp.,* 372 U.S. 29, (1963)." *(United States v Mazurie,* 419 US 544, 550.)

Whether the charges against defendant support a conviction for driving while intoxicated under subdivision 3 of section 1192 in the absence of chemical test evidence, the arresting officer's description of defendant driving his vehicle in an erratic and reckless manner, and his observation that defendant's eyes were watery and bloodshot, his speech slurred and that he was unsteady on his feet, with the odor of alcohol on his breath, informs defendant sufficiently of the factual basis for the charge, and of the possibility of conviction for impairment under subdivision 1 of section 1192.

The terms impairment and intoxication are not terms whose meanings are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application", in violation of the essentials of due process *(Connally v General Constr. Co.,* 269 US 385, 391). The difference between subdivisions 1 and 3 is obviously a matter of degree, so that as here, in the absence of chemical test evidence, it is reasonably understood that evidence of the defendant's physical condition and control of his vehicle will be introduced to establish the charge against him, and that a conviction can only be had where the proof is established beyond a reasonable doubt. Proof of conduct consistent with intoxication is "the most telltale, objective item of proof to be anticipated at trial of the subdivision 3 of section 1192 charge." *(People v Farmer,* 36 NY2d 386, 394, *supra.)*

Lastly, defendant's contention that the charge of violation of section 1192 in the accusatory instrument failed to indicate the subdivision defendant was being charged with and therefore failed to inform him sufficiently to defend the charge also fails upon an analysis of *People v Farmer (supra).* As noted therein (p 390) "a simplified traffic information charging a violation of subdivision 3 of section 1192 gives notice of the

generic offense, and, perforce, sufficient notice of the possibility of conviction under the subdivisions 1 or 2".

The issue is not whether the defendant knew that the last drink might render him "impaired" or "intoxicated". It is enough for him to know that if he drinks and drives that he runs the risk of violating the Penal Law with respect to safe driving. A felon who steals a watch may not know whether its value may convert him into one who commited petty or grand larceny. The statute involved in this case may be turgid, but it is clear enough to escape its being unconstitutional.

As a lesser included offense of the crime charged, there is no constitutional barrier to conviction for impairment, where the accusatory instrument alleges facts sufficient to establish the uncharged violation. *(People v Farmer, supra; People v Griffin,* 7 NY2d 511; *Paterno v Lyons,* 334 US 314, 319-321.)

Concur: Riccobono and Asch, JJ.; Hughes, J. P., dissenting.

APPENDIX C

OPINION OF
THE CRIMINAL COURT
BRONX COUNTY

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

THE PEOPLE OF THE STATE OF NEW YORK,

-against- Docket NO. X802969

HECTOR CRUZ,

Defendant.

APPEARANCES

For the People:
MARIO MEROLA, ESQ.
Bronx District Attorneys Office
Bronx, New York
By: Walter L. Rich

For the Defendant:
ARCHIBALD MURRAY, ESQ.
The Legal Aid Society
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Bronx, New York 10451
By: Alicia Kaplow

ANTONIO FIGUEROA, J.:

The defendant, Hector Cruz, was arrested on January 29, 1978, and charged with P.L. Section 205.30, resisting arrest, and V.T.L. Section 1192, operating a motor vehicle while under the influence of alcohol.

On February 15, 1978, a preliminary hearing was held. At the hearing the complainant, Police Officer Daniel Marrone testified as follows: He observed the defendant go through a red light; that on stopping the defendant the officer noticed that Mr. Cruz's breath bore a strong odor of alcohol. The defendant also, refused to take a breathalyzer test when asked to do so by the officer. At the conclusion of the hearing, the charge of resisting arrest was dismissed and this matter was adjourned for trial.

The present matter in front of this court, is a motion to dismiss the charges of driving while intoxicated. Defense counsel bases its argument on the ground that Vehicle and Traffic law section 1192 is unconstitutionally vague on its face and thus violates due process under the Fourteenth Amendment of the U.S.

Constitution and Article one, Section six of the New York State Constitution.

Much has been written on the tests or guidelines to be used to determine whether or not a statute passes the constitutional mandate of due process. The United States Supreme Court in Connally v. General Construction Co., 269 U.S. 385, 46 U.S. 126 (1926) held that the following factors should be used:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law (emphasis supplied)"

This "first essential of due process" is reiterated in our own N.Y. State Constitution in Article I Section 6 stating

"In any trial, in any court whatever, the party accused ....shall be informed of the nature and cause of the accusation."

The pertinent subsections of V.T.L. 1192 provide as follows:

> 1. No person shall operate a motor vehicle while his ability to operate such motor vehicle is "impaired" by the consumption of alcohol.
> 2. No person shall operate a motor vehicle while he has ".10 of 1% or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of V.T.L. 1194.
> 3. No person shall operate a motor vehicle while he is in an "intoxicated" condition (emphasis supplied).

Subsection one is classified as a violation(V.T.L. section 155) while subsections two and three are classified as misdemeanors. (Further, a conviction of either subsection two or three within ten years of a subsequent violation of either of these subsections constitutes a felony).

In examining V.T.L. 1192 then it is this court's task to determine whether or not the statute clearly indicates what it is that a man has the duty to avoid (U.S. v. Brewer, (139 U.S. 278) (1891)). It must be informative "on its face" and must be "so

clear and positive as to give unequivocal warning to citizens of the rule to be obeyed" (People v. Firth, 3 N.Y.2d 472, 474 (1957), People v. Vetri, 309 N.Y. 401 (1955), See also People v. Caswell-Massey Co., 6 N.Y.2d 497 (1959), and People v. Diaz, 4 N.Y.2d 469 (1958)). The phrases in the statute must have a specific meaning, or a well-settled common-law meaning; or the text of the statute itself must set forth the standards to be applied (Connally V. General Construction Co.,(supra), People v. Grogan, 260 N.Y. 138 (1932)). Finally, and most important, a person should be able to know in advance whether his actions are criminal or not (See Tozer v. United States, 52 F. 917 and People v. Bevilacqua, 12 Misc.2d 558 (County Court. Essex County)(1958)).

Cast in this light, the principal question to be resolved is whether the statute on its face, informs a citizen of the differences between driving while "impaired" under subdivision 1 anddriving while "intoxicated" under subdivision 3. Does the statute, on its face, give adequate notice as to the definition and distinctions between the two sections? Defense counsel claims that the alleged infirmity in the statute lies in the failure by the legislature to define and set forth the elements to distinguish between "impairment" and "intoxication", especially in the instance where a breathalyzer or chemical test result is not available as evidence to be used against the defendant.

As a starting point, I note the following comment by Justice Bestry in People v. Graser, 393 N.Y.S. 1009 (Amherst Town Court, Erie County)(1977):

> "Fifty-eight years ago the legislature did not by statute define intoxication and fifty-eight years later it has still not done so."

(See also People v. Little, (Westchester County)N.Y.L.J. May 10, 1978). As a matter of fact, the oft-cited and ancient case of People v. Weaver, 188 A.D. 395, 177 N.Y.S. 71, (1919) provides us with the only attempt at a definition of intoxication. Judge Cochrane in the Third Department defined intoxication from liquor

to mean "such a condition as impairs to some extent, however slight it may be, the ability of a person to operate an automobile (emphasis supplied). Simply stated, under this Weaver definition, if a driver's ability to operate an automobile is impaired by liquor, he is intoxicated (People v. Graser, (supra)).

Originally, the only offense that was listed under V.T.L. 1192 was the prohibition against driving while intoxicated. Prosecutors complained, however, that juries were reluctant to convict under this section. In response to this, the legislature in 1960, added a new subdivision prohibiting a person from driving while his ability was "impaired" by alcohol. This new offense was only listed as a traffic infraction, in the hopes of easing the prosecutions burden in such cases. However, the legislature specified that there could be no conviction for impairment unless the defendant had submitted himself to a chemical test and the results showed a .10 of 1% or more of alcohol in his blood. Therefore, the chemical test was a necessity in any trial on this charge and provided the trier of fact with some tangible of an ascertainable standard to be used to measure "impairment."

In 1970, the legislature repealed V.T.L. 1192 and replaced it with an entire new section. The prohibition against driving while intoxicated remained under subdivision 3. However, the reference to the requirement of a chemical test for proof of impairment under subdivision 1 was eliminated. A new subdivision 2 was created which prohibited a person from operating a motor vehicle while he had .15 of 1% or more of alcohol in the blood as determined by a chemical test.(A conviction under subdivision 2 constituted a misdemeanor). These changes seemed to indicate the legislature's intent to provide that "impairment" under subdivision 1 could now be proved by observational testimony alone, where previously, a chemical test was required.

By changing the standards of proof, however the defendant is not given adequate notice, beforehand, as to when he stops

over the line of demarcation from impairment to intoxication. The trier of fact must determine what the "line" is, by examining the subjective state of mind of the defendant at the time of the arrest. The meanings of the terms remain unclear because the trier of the facts may convict one person for impairment, and another person for intoxication, for the same act.

The legislature also created V.T.L. 1195 and 1196 in 1970. Section 1195 set forth the evidentiary effect of chemical test evidence for violations of section 1192 (assuming of course that a test was properly administered pursuant to V.T.L. 1194).

In its present form V.T.L. 1195 provides in substance that:

> a) Evidence of .05 of 1% or less of alcohol in the blood is prima facie evidence of neither impairment nor intoxication.
> b) Evidence of more than .05 of 1% but not more than .07 of 1% of alcohol content is relevant evidence in determining impairment and is prima facie evidence that such person was not intoxicated.
> c) Evidence that there was more than .07 of 1% but less than .10 of 1% by weight of alcohol in the blood is prima facie evidence of impairment and is prima facie evidence that the person was not intoxicated.

It is plain to see, that V.T.L. 1195 is only applicable if a chemical test is properly administered. Even then, chemical test evidence is only prima facie evidence in one instance, to wit, a blood-alcohol content of more than .07 of 1% but less than .10 of 1% is prima facie evidence of impairment. Other standards of alcohol-blood levels are only "relevant evidence" to determine impairment or intoxication. Thus despite these quantitive standards which the legislature has enacted in the hopes of providing some standards to differentiate between "impairment" and "intoxication" no one can be sure to any degree of certainty when a driver has passed the stage of being impaired to the stage of being intoxicated. It is possible for this statute to charge one person with being intoxicated while driving, (constituting a crime), and another person with being impaired while driving (constituting an infraction) for an identical act. (People v. LaPlante, 81 Misc.2d 34 (Justice Court of Tonawanda)(1975)). The legislature thus left a gaping

definitional hole in replacing the old statute in 1970 with the present statute.

This problem is further compounded when there is an absence of a chemical test, as is the case here. This situation can occur in numerous ways i.e. a failure to give the test, a failure to administer the test properly as provided in V.T.L. 1194, a refusal by the defendant to take the test, etc., (This court also notes recent reports of new drug discoveries which can effectively break up alcohol in the blood stream and thus will render any chemical test or breathalyzer test ineffective in the future). Without a chemical test, V.T.L. 1195 becomes useless and the problem of differentiating between "impairment" and "intoxication" reaches its zenith for the trier of fact. The only guideline we have left is the Weaver definition of intoxication, which is no guideline at all.

Numerous courts have anguished over this question when faced with an absence of a chemical test. In People v. Jones, 77 Misc.2d 33 (Town Court of Tonawanda)(1974) the court expressed the opinion of many judges on this issue:

> "There does not appear to be any standard in New York, by which I can advise a jury or myself of the distinction between driving while one's ability is impaired by the use of alcohol and driving while intoxicated....In many cases it will be most difficult to detect the difference between driving while impaired and driving while intoxicated".

(See People v. St. Ours, 54 A.D.2d 1080, 388 N.Y.S.2d 752 (4th Dept.)(1976), People v. Kapsuris, 89 Misc.2d 634, 392 N.Y.S.2d 785 (1977), People v. Barrett, 89 Misc.2d 631, 393 N.Y.S.2d 225 (1976), People v. Weber, 82 Misc.2d 593, 371 N.Y.S.2d 361 (1975)). The Jones court also cited the case of Holley v. State, (25 Ala. App. 260) where the court, in describing the difference between being "under the influence of intoxicating liquors" and being "intoxicated" noted:

> "The difference is that of Tweedle Dee and Tweedle Dum....There are perhaps as many stages of intoxication as there are varieties of Heinz Pickles.. and the party affected rarely knows when he passes from one

stage to another."

The Jones court addressed itself to the same issue a year later in People v. LaPlante, (supra). The court here, decided that V.T.L. 1192 subdivision 3 was unconstitutional but (as it did in the Jones case) found the defendant guilty of driving while impaired under subdivision 1. The court had spoken to numerous attorneys, judges, legislators, etc. about this statute during the interim and was more convinced that ever that it was impossible to distinquish between subdivision 1 and subdivision 3. It held that the boundary between an act which was merely a violation and an act which was a crime, was unconstitutionally vague.

This view, however, was not shared by all members of the judiciary. Judge Forsyth in the case of People v. Miller, (83 Misc.2d 118) (Town Court of Webster, Monroe County) (1975) rejected the arguments in both LaPlante and Jones. He determined that a distinction could be made between the terms "impairment" and "intoxication" merely by looking at their ordinary meanings in a dictionary.

The court held that a person reached the state of intoxication when his judgment and ability to operate a motor vehicle became adversely affected to a "substantial degree." The court held that a person reached the state of impairment when he had consumed enough alcohol to lessen or impair his physical or mental control of a vehicle to a "significant degree". It is my opinion, however that these definitions do not clarify the distinction between impairment and intoxication, at all.

The court in People v. Graser, (supra) also upheld the constitutionality of both subdivisions holding that impairment and intoxication, created no problems, since V.T.L. 1195 provided quantitative standards as to the degree of difference between the two terms. However, even this court recognized that without a chemical test, the difference between impairment and intoxication would become vague since V.T.L. 1195 would not longer apply.

violated. (Connally v. General Construction Co. (supra) and People v. Firth (supra)). (People v. Farmer, (36 N.Y.2d 396) (1975) (which was also used by the Graser Court to find the statute constitutional) was found to be not relevant to the issue of constitutional vagueness of the statute since the Court of Appeals only dealt with the constitutionality of V.T.L. 1196 and not V.T.L. 1192).

In the case of People v. Little, (Supreme Court, Westchester County) N.Y.L.J. (May 10, 1978,) the court recognized that there were no statutory definitions of intoxication and impairment but held that there was still a line of demarcation between the two terms. The court then cited the Weaver definition of intoxication and stated that the facts did not meet the Weaver standard. Therefore, the court convicted the defendant under subdivision 1 (impairment). However, the court failed to define what impairment meant and thus begged the question rather than providing any clarification on this point.

This court also notes the recently reported case of People v. Bradford (Supreme Court, Bronx County) N.Y.L.J. Oct. 19, 1978, pg. 11 col. 2. The Court there, found that section 1192 was not unconstitutionally vague. It held that impairment and intoxication were defined qualitatively in the statute. It stated that if a jury found that the consumption of alcohol by the defendant resulted in the loss of control of a motor vehicle, which was less than that which would be exercised by a reasonably prudent driver, the defendant would be guilty of driving while impaired (subdivision 1). If the loss of control was of a higher degree than this, the jury could determine that the defendant was driving while intoxicated (subdivision 3). For the reasons previously given, I am still unconvinced that this definition adequately defines the distinction between impairment and intoxication to meet due process requirements.

After tracing through the legislative history and all

relavant cases, this court is convinced that V.T.L. 1192 subdivision 1 and 3, fail to meet due process requirements of the Fourteenth Amendment of the U.S. Constitution and Article one, Section six of the New York Constitution. V.T.L. 1195 falls far short of providing any useful guideline to determine the distinction between impairment and intoxication. When a chemical test is not done, or not done properly, or just refused by the defendant, we are left with the ancient Weaver definition. This proves to be no help as the term impairment is used to define the term intoxication. One undefined term is used to define another undefined term, and the difference is degree between the two terms is left unclear. The average citizen is unable to determine when his next drink will push him over the precipice from a violation for impairment to a violation for a crime of intoxication. These sections are vague because man of common intelligence must necessarily guess at their meanings and differ as to their applications. A person is not able, from the face of the statute, to know in advance whether his actions are criminal or not. The statute thus violates the first essential of due process of law.

Finally, the prosecution has questioned whether it is the duty of this court to make findings of constitutionality, or whether these matters should be best left to an appellate court (See Smith v. Schanbel, 51 Misc.2d 628 (1969). This court recognizes that a presumption exists, that a statute duly enacted by the legislature is constitutional (McKinney's Consolidated Laws of N.Y., Book 2, Constitution section 41) (See People v. Pagnotta, 25 N.Y.2d 333 (1969). However, this court feels that it has the obligation to rule on the constitutionality of statutes, especially where life and liberty are involved and whom the alleged infirmity of the statute is facially apparent. (See People v. Holletta, 87 Misc.2d 236 (Bronx Co.) (1976), People v. Tabb, 90 Misc.2d 431 (New York Co.)(1975) . This court does not merely serve as a resting stop on the road to the various appellate

courts. I agree with the following statement:

"It is just as much the duty of the court of first instance to declare invalid and prevent clear violations of the constitution by legislative enactment as it is the like duty of the court of last resort upon appeal, and this duty should not be evaded by the trial judge, by casting responsibility upon appella tribunals" (People ex. rel. Wogan v. Rafferty, 77 Misc. 259(1912)

The information against the defendant, Hector Cruz, is hereby dismissed.

DATED: October 31, 1978

ANTONIO FIGUEROA, JUDGE OF THE BRONX CRIMINAL COURT, CITY OF NEW YORK.

Decision constitutes order of the Court.

G.S.F.

APPENDIX D

REMITTITUR OF
~~THE NEW YORK~~
COURT OF APPEALS

Remittitur

Court of Appeals
State of New York

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

App T No. 465
The People &c.,
Appellant,
vs.
Hector Cruz,
Respondent.

The appellant(s) in the above entitled appeal appeared by Mario Merola, District Attorney, Bronx County;
the respondent(s) appeared by William E. Hellerstein, The Legal Aid Society.

The Court, after due deliberation, orders and adjudges that the order is reversed, the accusatory instrument reinstated and the case remitted to the Criminal Court of the City of New York, Bronx County, for further proceedings. Opinion by Wachtler, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Criminal Court of the City of New York, Bronx County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Joseph W. Bellacosa

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 20, 1979.

APPENDIX E

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

CRIMINAL COURT OF THE CITY OF NEW YORK
BRONX COUNTY

----------x

HECTOR CRUZ, : Docket No. 802969
County Clerk's
Appellant. : No. 48210/79

-against- : NOTICE OF APPEAL
TO THE SUPREME COURT
NEW YORK. : OF THE UNITES STATES

----------x

S I R S:

PLEASE TAKE NOTICE, that HECTOR CRUZ, the appellant above-named, hereby appeals to the Supreme Court of the United States from an order of the Court of Appeals of the State of New York entered on November 20, 1979, which reinstated the accusatory instrument charging appellant with violating §1192 of the Vehicle and Traffic Law and remitted the case to the Criminal Court of the City of New York, Bronx County, for further proceedings.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: New York, New York
January 28, 1980

FILED
JAN 29 1980
CRIMINAL COURT
NEW YORK COUNTY
APPEAL BUREAU

Yours, etc.,

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